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In the Supreme Court of the United States

OCTOBER TERM, 1987

BEMIS PENTECOSTAL CHURCH, et al.,

Appellants,

vs.

STATE OF TENNESSEE, et al.,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF TENNESSEE

BRIEF AMICUS CURIAE

OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., IN SUPPORT OF PLENARY REVIEW OF THIS APPEAL

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are major religious bodies in the United States, or membership organizations concerned with the preservation of religious freedom. They have obtained the consent of the parties to participate in this appeal by the filing of this brief. The original and a copy of the consent letters of counsel of record for the parties have been submitted to the Clerk of this Court.

Pursuant to Rule 36.1 of this Court, amici file this brief in order to call to the attention of this Court the impact of this litigation on the autonomy and integrity of all religious bodies, irrespective of their various positions on the morality of sale of liquor by the drink. In the view of the amici, the First Amendment theory articulated by the Tennessee Supreme Court impermissibly subjects religious bodies to extensive governmental regulation and impermissibly burdens the right of religious bodies to share publicly their sincerely held religious views on matters of public concern. The statement of interest of each amicus participating in this brief follows.

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progessive National Baptist Convention, Inc; Seventh Day Baptist General Conference; and Southern Baptist Convention.[1] These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond "whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, the freedom of the church from entangling relationships with the government is a fundamental and sacred principle.

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[1] The Executive Board of the Tennessee Baptist Convention appeared as Amicus Curiae in the court below on behalf of Southern Baptist churches in Tennessee. Because the case is now of national import, the Baptist Joint Committee is the proper representative of Baptist concerns.

The Catholic League for Religious and Civil Rights is a civil rights and anti-defamation organization, national in membership, dedicated to the defense of religious liberty and freedom of expression. This appeal raises substantial questions relating to both of these League concerns. When the government invokes state power to conduct intrusive and far-reaching examinations of internal church documents, religious liberty suffers. When the government chills legitimate expressive activity crucial to effective church teaching on matters of public concern, freedom of expression cannot flourish.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students founded in 1961. The Center for Law & Religious Freedom is a division of the CLS founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights required by the First Amendment.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-eight denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates.

The National Council of Churches of Christ in the U.S.A. is a community of thirty-one religious communions numbering over 40 million members. Some of these communions would agree with the views expressed by the Appellant churches concerning sale of alcohol; some of them would disagree. All of them have agreed, however — through their representatives on the Governing Board of the National Council of Churches — in support of religious bodies and all citizen groups to speak and to act on questions of public policy without extensive and intrusive regulations, including public disclosure of detailed, itemized financial information about the members of their religious bodies. The Governing Board of the National Council of Churches has specifically recommended that its member communions not impair the relationships of confidence and

trust within the religious community by disclosing to outsiders "the names of contributors, members, constituents . . . [or] personnel files, correspondence or other confidential and/or internal documents or information."

ARGUMENT

I.

THIS APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS UNDER THE RELIGION CLAUSE AND THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT BECAUSE IT INVOLVES COURT-SANCTIONED IMPOSITION OF EXTENSIVE GOVERNMENTAL REGULATION OF RELIGIOUS BODIES ATTEMPTING TO SPEAK PUBLICLY ON MATTERS OF PUBLIC CONCERN.

This appeal is brought from a judgment of the Tennessee Supreme Court holding that the Tennessee Campaign Financial Disclosure Act of 1980 [the Act] may constitutionally be applied to Appellants, thirteen churches which sponsored paid advertisements on a local referendum issue concerning the sale of liquor by the drink. The Act requires a political campaign committee [PCC] to comply with extensive and detailed financial disclosure statements. The Act defines a PCC as any group of two or more individuals making expenditures exceeding $250 per year to support or oppose a measure offered to the voters for their consideration. On the view of the Tennessee Supreme Court, the Act may require religious bodies wishing to express biblically based views on a matter of public concern (1) to register with the State as a PCC before accepting any contributions to promote, advertise, or publicly advocate sincerely held, conscientious convictions, and (2) to file with the State detailed financial statements, including the names and addresses of all persons who contribute more than $100 to the church for this purpose.

Although the Act does not contain an absolute prohibition against participation in a political campaign by a religious body, the application of the Act to religious bodies severely chills the ability of these oranizations to advance their positions on a wide variety of public policy matters.

The court below erroneously ruled that the "sole determinative issue is whether the Act violates the free speech clause of the First Amendment." *Bemis Pentecostal Church v. State*, ___Tenn___, 731 S.W. 2d 897, 903 (1987); Jurisdictional Statement [JS], at 10a. Amici agree with the Appellant churches that the free speech clause is clearly implicated in this case and leads to an opposite result from that reached below. See pp. 16-18, *infra*, and see JS *passim*. But the application of the Act to thirteen churches attempting to announce their religiously based message on a matter of public concern clearly implicates the religion clause of the First Amendment as well. In the interest of avoiding duplicative briefing, the primary focus of this brief is upon the religion clause.

A. The Religion Clause Affords Protection against Extensive Regulation of a Religious Body which Chooses to Announce Sincerely Held Religious Beliefs that Relate Directly to Public Policy Questions.

Amici do not claim that when religious organizations choose to "enter a public forum and spread their views," *Heffron v. ISKCON*, 452 U.S. 640, 653 (1981), they are always entitled to protection greater than that enjoyed by non-religious social or political organizations. By the same token, however, religious bodies are surely entitled at the very least to no lesser degree of protection than that enjoyed by their secular counterparts. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring). It is likewise clear that special concerns of religious autonomy and integrity arise when the government seeks to regulate a religious body which are not present when it seeks to regulate a secular organization. See, e.g., *Corp. of Presiding Bishop v. Amos*, 483 U.S. ___, 107 S.Ct. 2862, 2871

(1987) (Brennan, J. concurring); and see *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Specifically the application of the Act to the Appellant churches violates both provisions of the religion clause by requiring these churches (1) to register as a PCC as a condition of exercising their right to speak in opposition to a referendum issue of moral concern, (2) to elect a special officer of the church designated as a political treasurer, and (3) to disclose to the public the names and addresses of all church members who contribute more than $100 to the church's effort to announce its religious message on matter of public concern.

(i) Free Exercise Concerns

The record in this case is replete with undisputed testimony that the Appellants were compelled to speak out publicly on the liquor-by-the-drink referendum because of their sincerely held religious convictions.[2] The *religious* nature of the efforts of the thirteen Appellant churches to announce their religious message to the participants in the local referendum in Jackson is readily apparent when viewed in the context of testimony offered to the Congress by their national counterparts. Like the Appellants, these representatives of a host of denominations and other religious bodies are called upon regularly to express the views of religious groups on a wide variety of social and political issues with pressing ethical components.

For example, in testimony before the House Ways and Means Committee in 1972, John Baker explained the role of the Amicus Baptist Joint Committee on Public Affairs as follows:

> Some religious entities believe that their religious faith commits them to a complete withdrawal from

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[2] See, e.g., testimony of Rev. John Lee Taylor, Pastor of West Jackson Baptist Church, Tr. at 55-57; testimony of Forest Montgomery, Tr. at 134; testimony of Robert A. Destro, Tr. at 188-189, 191-192, 195; and testimony of Dean Kelley, Tr. at 145; and see JS at 61a-66a.

> the secular world. Others are compelled by their faith into an active participation in nearly every aspect of that secular world. If they are to be good stewards of their religious influence these people sincerely believe they must be involved in the formation of public policy. War and peace, human welfare, civil rights, abortion, and education are all public issues, but they have attributes which make them also religious issues.

Legislative Activity By Certain Types of Exempt Organizations, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. at 282 (1972).

Dr. J. Elliott Corbett entered into the record of these hearings a policy declaration of the General Conference of the United Methodist Church:

> We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people.

Dr. Corbett commented on this policy statement as follows:

> This statement makes clear that the church should speak out on public policy questions and seek to influence the formation of public policy as it relates to the government. The declaration points out the inappropriateness of denying the church its role in relating to public policy and that such a denial would threaten religious liberty. The question here arises as to whether 'the free exercise' of religion, as provided in the First Amendment is denied if limitations are

> placed on church lobbying in areas affecting the church's purpose in society. In other words, the *First Amendment guarantee of 'the free exercise of religion' should not permit the state to tell the church when it is being religious and when it is not.* The church must be permitted to define its own goals in society in terms of the imperatives of its religious faith. Is the Christian church somehow not being religious when it works on behalf of healing the sick, or for the rights of minorities, or as peacemaker on the international scene? No, the church itself must define the perimeters of its outreach on public policy questions.

Id. at 303, 305 (emphasis added). See also Statement of United States Catholic Conference, *id.* at 307-312; and Statement of National Jewish Community Relations Advisory Council, *id.* at 99.[3]

The congressional testimony referred to above demonstrates conclusively that for many religious bodies, political speech such as that engaged in by the Appellant churches is a form of religious ministry. The undisputed testimony on the record of this case further demonstrates that the application of the Act to the Appellant churches has imposed significant burdens on their religious ministry. Dr. Madden, for example, testified that

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[3] Four years later, in similar hearings before the House Ways and Means Committee on legislation to regulate the lobbying efforts of exempt organizations, representatives of religious bodies were even more emphatic than in their earlier testimony that attempts to regulate the participation of religious bodies in matters of public concern create special constitutional problems of abridgement of free exercise of religion. See, e.g., Statement of James E. Woods, Jr. on behalf of the Baptist Joint Committee on Public Affairs, in *Influencing Legislation by Public Charities*, Hearings Before the House Ways and Means Committee (1976); and see Statement of the Lutheran Council in the U.S.A., *id.* at 75-76; Statement on Behalf of the National Council of Churches of Christ in the U.S.A., *id.* at 81-82; and Statement of the United States Catholic Conference, *id.* at 90.

the characterization of a religious organization as a PCC under the Act has had a "devastating . . . chilling and discouraging and inhibiting" effect upon churches in Tennessee which would have spoken out on issues of public concern, but for the restrictive provisions of the Act. JS, 63a. No sensible interpretation of Free Exercise jurisprudence can fail to conclude that the Act has imposed a significant, indeed a substantial, burden on the freedom of religious organizations to announce their message on public policy matters. The imposition of such a burden on religious organizations merits plenary review by this Court.

This Court, moreover, should consider the impact of the rule announced by the lower court not simply upon the Appellant churches in this case, but upon religious bodies throughout the country which have since the dawn of the republic regarded it part of their religious ministry to announce their religious message on a wide variety of matters of social concern. As Professor Tribe has noted, "churches and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." L. Tribe, *American Constitutional Law* 867 (1978). Other matters of public concern which have been addressed by religious groups recently include nuclear war, capital punishment, adequate health care, foreign policy and immigration policies relating to Latin America or South Africa. The freedom to address these and other vexing issues from a religious perspective should not be conditioned upon the regulations imposed upon the Appellant churches by the court below.

Requiring churches to register as PCCs in order to address the most pressing moral and social issues of our day substantially burdens the free exercise rights of religious bodies. Contrary to the history of religious freedom in this country, the State seeks, in effect, to license those churches which choose to proclaim their vision of the good in the

political order.[4] As construed by the lower court, the Act not only requires churches to obtain advance permission from the State to engage in one of the most fundamental acts of ministry, it also distorts the public's perception of that ministry. Although the time, energy and effort required in order to comply with the requirements of the Act is demonstrably burdensome, see testimony of Dean Kelley, Tr. 149, that administrative burden is not at the center of the concerns of the amici. Nor is the reluctance of a religious body to register with the State as a PCC a matter of distaste or scorn for the political order. The religious objection of the amici to the application of the Act to a religious body is that it distorts that body's religious message by communicating to the public that it is not a religious group acting religiously, but simply another political interest group acting out of characteristcally self-interested political considerations. This distortion of the church's prophetic ministry constitutes an additional burden upon free exercise of religion worthy of plenary review by this Court.

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[4] This Court has frequently relied on legal history as an aid to resolving current cases dealing with the Religion Clause. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983); *McDaniel v. Paty*, 435 U.S. 618 (1978); and *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970). Under this approach this Court should not adopt the theory implicit in the judgment of the lower court because governmental licensing of religious preaching was one of the historical practices which the First Amendment was expressly designed to prohibit. See, e.g., W. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State* 441-476 (1971); M. Kammen, *Colonial New York: A History* 157-158 (1975); and Eckenrode, *Separation of Church and State in Virginia* (1910). For a discussion of the repulsion to licensing of dissemination of views by the Press, see, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, CJ., concurring), and *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). And see *United States v. National Committee for Impeachment* 469 F. 2d 1135, 1140 (2d Cir. 1972) (no First Amendment distinction between newspaper editorial and paid political advertisement, the publication of which does not make the sponsor a political action committee subject to federal regulation).

Even more seriously, the Act has had a chilling effect on the prophetic ministry of religious bodies. This conclusion is supported by the uncontradicted expert testimony in this record; see, e.g., testimony of Rev. Dean M. Kelley, JS, 65a. Indeed, it is likewise clear on this record that the fear of inhibition of free speech is not at all speculative. The record discloses that the Act has already begun to silence the churches. Rev. Maurice Coleman, Pastor of the First Baptist Church, Waverly, TN, testified that the burden which the Act imposed on his church was so severe that his church refrained from speaking out on a similar referendum, despite deeply held religious convictions on the issue presented to the public in his community, Tr. 104-112; see JS, 61a-62a. Dr. Thomas J. Madden, Executive Secretary of the Executive Board of the Tennessee Baptist Convention likewise testified that other churches in Tennessee had been deterred from addressing referendum issues publicly for fear that the government would label them as PCCs. JS, 63a (impact of the Act on Baptist churches "devastating, . . . chilling and discouraging and intimidating"). The severity of the chilling effect of the Acct constitutes a separate reason for plenary review of this appeal.

Having demonstrated that the ability of religious bodies to make public statements of a religious nature on matters of public concern is burdened by the application of the Act to religious bodies, the Appellant churches should be exempt from its coverage unless the State can demonstrate that it has utilized the least restrictive means of achieving a truly compelling governmental interest. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. ___, 107 S.Ct. 1046, 1094 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The State failed to meet its evidentiary burden of proving that any compelling state interest exists for extending coverage of the Act to religious bodies.

The view that protection of the integrity and fairness of the political process is a legitimate and even a "compelling" governmental interest, is hardly exceptionable as a general

principle. As the Tennessee Supreme Court stated: "Considering that the results of a referendum often entail enduring and significant changes in community life and that diverse interests compete to influence the public policy of the state at every level of political action, the public has a right to know at a minimum how campaigns on public issues are financed and by whom." *Bemis Pentecostal Church v. State, supra*, 731 S.W. 2d at 903 (1987); JS, at 11a.

This case, however, involves bona fide religious organizations attempting to engage in clearly protected activity. Hence casual invocation of the "infamous Watergate slush fund," *id.* at 904, JS 12a, is spurious, raises false connotations by innuendo, and does not provide a sufficient justification for the application of the Act to a religious body wishing to participate in a referendum. This is true for five reasons. First, the rationale for restricting involvement in the political process does not apply with equal force to all groups. As this Court recognized last Term, a State may have a compelling interest in limiting the campaign contributions of for-profit organizations, but a far less significant interest in regulating the political freedom of a not-for-profit organization. *FEC v. Massachusetts Citizens for Life*, 479 U.S. ___, 107 S.Ct. 616 (1986).

Second, this record is wholly devoid of the slightest hint of "corruption" which the lower court invoked as the rationale for its rule. As this Court clarified in *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), an unspecified concern about "hypothetical potential for corruption" does not articulate a rationale for regulating "the presentation to the electorate of varying points of view" on issues of public concern. *Id.* at 498. The State offered no proof whatever either that any political group in Tennessee has ever dissembled to the point of cloaking itself as a church solely to avoid the requirements of the Act, or that such misrepresentation is likely to occur in the future. Upon close inspection, the governmental interest which the Tennessee Supreme Court deemed "compelling" turns out to be a merely speculative worry about an "imaginable but totally implausible evil."

Wolman v. Walter, 433 U.S. 229, 260, n.6 (1977) (Marshall, J., concurring and dissenting).

Third, even if fraud of this magnitude were to occur, the State is not without power to sanction it. See, e.g., *Ballard v. United States*, 329 U.S. 187 (1946). A reviewing court, moreover, need not plumb the depths of its imagination to discover an equally effective alternative means of enforcing the governmental interest which the lower court found "compelling," for in this case the Tennessee legislature expressly provided criminal sanctions in the Act wholly adequate to the governmental interest of protecting against potential fraud, § 2-10-110 (a). For this reason it is unnecessary to construe the Act, as the lower court did, to apply across the board to all religious bodies wishing to be heard on matters of public concern.

Fourth, this Court should not accept the State's argument that its interest in preventing election fraud requires expansive application of the Act to activity of churches otherwise protected by the First Amendment because that argument cannot be squared with the text of the Act. The Act explicitly exempts from the reporting requirements news organizations protected under the free press clause of the First Amendment when, for example, they engage in political speech in the editorial process, § 2-10-102(3)(B). This statutory provision renders easy the search for a less restrictive alternative means of enforcing the interest of the State. All that a reviewing court must do is require the State to extend to religious bodies protected under the religion clause of the First Amendment an exemption for religious organizations wishing to be heard on matters of public concern similar to that which the Act affords to news organizations thought to be protected under the free press clause of the same amendment.

Fifth, unless the lower court is reversed, greater protection will be afforded to for-profit news organizations than to not-for-profit religious organizations. Erratic line-drawing of this sort impermissibly prefers one kind of First Amendment corporation over other groups protected under the same

Amendment. This result is impermissible under *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court ruled that a public university which creates a forum generally open to students may not favor one form of speech over another because of the religious character of the speech. It is likewise impermissible under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), where this Court invalidated a state statute prohibiting expenditures by for-profit corporations for the purpose of influencing the vote on referendum proposals on the view that this kind of regulation abridges expressive activity "at the heart of the First Amendment's protection." *Id.* at 776. As Justice Powell stated in *Bellotti*: "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations — *religious*, charitable, or civic — to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 784-785 (emphasis added). [5] There is more than a subtle irony that the primary

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[5] The lower court distinguished *Bellotti* on the ground that the Massachusetts statute invalidated in *Bellotti* imposed direct limits on speech, unlike the Tennessee Act, characterized as imposing mere financial disclosure requirements. *Bemis, supra*, 731 S.W. 2d 897, 906 (1987); JS, at 16a. *Bellotti* may not be disposed of quite so readily. As this Court stated in *Bellotti*, to ask whether corporations have free speech rights is to pose the wrong question. The inquiry should focus on the type of speech at issue, not its source: "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy. . . . [The] inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source. . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosely*, 408

beneficiaries of the statutory exemption in the Act are immensely powerful for-profit news media corporations and that the institutions directly burdened by the ruling of the lower court are less powerful not-for-profit religious bodies.[6]

For these reasons, amici urge this Court to grant plenary review of the substantial federal questions affecting free exercise of religion presented in this appeal.

(ii) Establishment Concerns

Amici are also of the view that substantial federal questions are presented in this appeal which arise under the Establishment Clause. Amici do not dispute that the application of the Act to the Appellant churches reflects a secular purpose. *Edwards v. Aquillard*, 482 U.S. ___, 107 S.Ct. 2573 (1987). Two other criteria set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), however, are offended by the decision below. As amici already demonstrated in the discussion of free exercise concerns, pp. 5-14, *supra*, the primary effect of the application of the Act to the Appellant churches has been to *inhibit their religious activity*. A similar, if not identical, concern is reflected in the manifest tendency of the decision below to *entangle the government excessively in religious matters* properly thought to be within the zone of autonomy and associational privacy enjoyed by religious organizations.[7]

U.S. 92, 96 (1972)." *Id.* at 777, 784. The lower court's distinction of *Bellotti* overlooks the uncontroverted evidence on this record that the application of the Act to religious bodies has already had the very effect condemned in *Bellotti*: governmental preference as to who may address a public issue.

[6] This Court has repeatedly clarified that the institutional press does not have free speech rights superior to those of the general public. See, e.g., *Bellotti, supra*, 435 U.S. at 798 (Burger, C.J., concurring); *Pell v. Procunier*, 417 U.S. 817, 834 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 684-685 (1972).

[7] See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190

On a record far less clear on the probability of governmental entanglement than the record in this case, this Court ruled that the mere possibility of or potential for such entanglement sufficed to invalidate an otherwise lawful statute. *Aguilar v. Felton*, 473 U.S. 402, (1985). See also *Walz v. Tax Commission*, 397 U.S. 664, 674-675 (1970) (sustaining tax exemption of property used exclusively for public worship because taxation of such property would have the effect of entangling the government in religious matters).

As the uncontroverted expert testimony on this record suggests, see testimony of Dean Kelley, mandatory disclosure of internal church records to the general public and potential governmental scrutiny of such records gives rise to an impermissible level of entanglement with religion. Tr. 149-150. Apart from bona fide investigation of fraud, undue influence, private inurement, or other misconduct, the State has no business scrutinizing the internal financial affairs of religious bodies.[8] As amici demonstrated above, this record does not contain the slightest hint of any basis for legitimate

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(1960), and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *Milivojevich* is illuminative in this appeal, for it safeguards the autonomy of the religious community against the use of the secular judicial process by a dissenting member of the church. A fortiori, use of the judicial process against a religious body by secular authorities should likewise be viewed as inimical to the purpose of the religion clause. The *Kreshik* case reinforces this point, for it commands that the judiciary refrain from intruding on the autonomy of a religious body, just as *Kedroff* had prohibited intrusion in the internal affairs of a religious body by the legislature. In the instant case, it is all the more necessary that the judiciary express greater care about "delicate and sensitive questions arising out of the Religion Clauses" where the Legislature has not affirmatively and expressly directed that a regulatory burden be imposed upon a religious body. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

[8] Congress has manifested sensitivity to these concerns. See, e.g., I.R.C. § 6033 (exempting religious bodies from duty to file detailed annual financial report); and see I.R.C. § 7605 (specifying procedures to be followed before a church may be audited).

investigation either of criminal wrongdoing or of civil liability for a tax offense. Because this Court has "long recognized that underlying the establishment clause is the 'objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other' " *Lemon, supra*, 403 U.S. at 614, this Court should grant plenary review of this appeal.

B. The Free Speech Clause Protects Churches No Less Than Other Concerned Citizens or Groups When They Engage in Political Speech on Matters of Public Concern.

The free speech clause grouds a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Thus this provision affords another ground for finding unacceptable the restrictions on the political speech of religious bodies imposed by the court below. In another case involving restrictions placed by the State of Tennessee upon the civil liberties of religious bodies and their members, Justice Brennan expressly concluded in *McDaniel v. Paty*, 435 U.S. 618 (1978) that the fundamental right to participate in the political process is enjoyed not only by secular institutions and private citizens, but also by religious bodies and their members:

> [R]eligious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide open' [citing *Sullivan*]. . . . [T]hat public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife, does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of

> discussion, association and political participation generally.

Id. at 640; see also plurality opinion of Chief Justice Burger, *id.* at 626. Similarly, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court stated:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as secular bodies and private citizens have that right.

Id. at 670.[9]

Although the State does not impose an absolute ban on the political speech of religious corporations in the instant case, it does seek to impose regulations which significantly burden the ability of religious bodies to announce their religious message on matters of public concern. It is well settled that any statute which significantly burdens free speech rights may be sustained only on a showing by the government that the statute serves a truly compelling state interest and that the means chosen by the government to achieve this end is the alternative least restrictive of fragile free speech rights, which need "breathing space" in order to survive. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963). Hence the same analysis set forth as free exercise concerns, pp. 5-14, *supra*, applies with equal force to the analysis of the judgment of the lower court under the free speech clause. [10] Because the view of the free speech clause

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[9] See also *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980), rev'd on other grounds, sub nom. *Harris v. McRae*, 448 U.S. 294 (1980): "It is clear that the healthy working of our political order cannot safely forego the political action of the churches, or discourage it. The reliance, as always, must be on giving an alert and critical hearing to every informed voice, and the spokesmen of religious institutions must not be discouraged nor inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect." *Id.* at 741.

[10] Whether stated as free exercise concerns or free speech

espoused by the lower court is counterintuitive and flies in the face of the great purposes of political speech in our democracy, this Court should grant plenary review of this appeal in order to address the substantial questions presented under the free speech clause.

II.

THIS COURT SHOULD GRANT PLENARY REVIEW OF THIS APPEAL IN ORDER TO GIVE CLEAR GUIDANCE TO THE LEGISLATURES OF THE SEVERAL STATES CONCERNING THE LIMITS OF STATE CAMPAIGN FINANCE LAWS PURPORTING TO REGULATE RELIGIOUS NOT-FOR-PROFIT ORGANIZATIONS PUBLICLY ENGAGED IN MORAL ADVOCACY ON MATTERS OF PUBLIC CONCERN PRESENTED TO THE ELECTORATE FOR THEIR DELIBERATION AND DECISION.

Because the decision of the court below can have a national impact on religious freedom far beyond the confines of the present litigation, amici append to this brief a table of state statutes regulating various aspects of campaign financing. [11]

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concerns, three conclusions are unavoidable on this record: (1) the Act has the chilling effect of inhibiting religious expression on matters of public concern; (2) the State has not shown a compelling governmental interest to justify the intrusion on protected activity; and (3) the exemption in the Act for news organizations points to a less burdensome means of achieving the governmental interest.

[11] All fifty states impose requirements on groups attempting to communicate with the electorate in candidate elections. Thiry-eight states impose registration and reporting requirements in elections concerning referenda or other ballot measures concerning general public policy. In addition to the Tennessee Act challenged as applied in this appeal, six other states have similarly exempted the press from registration and reporting requirements.

This appeal presents a case of first impression. No other state decision of which amici are aware has expressly ruled that the provisions of the state campaign financing law must be extended to a religious body engaged in moral advocacy on issues of public concern. Only one statute, Iowa Code § 56.2.6, expressly includes religious organizations within the definition section relating to covered political action committees. The plain meaning of the terms of the various state statutes summarized in the Table in the Appendix, however, evinces neither a clear expression of intent to regulate religious bodies, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), nor any evident concern for the delicacy of religious freedom threatened by including religious bodies among regulated political action committees. This court should grant plenary review of this appeal in order to give clear guidance to the legislatures of the several states concerning the limits of state campaign finance laws purporting to regulate religious not-for-profit organizations engaged in moral advocacy on matters of public concern presented to the electorate for thier deliberation and decision.

CONCLUSION

For the reasons set forth in this brief, amici curiae urge this court to grant plenary review of the substantial federal questions presented in this appeal.

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APPENDIX

Table of State Statutes Regulating Campaign Expenditures

Table of State Statutes Regulating Campaign Expenditures

State	Citation	Elections Candidate/Issue	<$	Exemptions Purpose	Press
Alabama	17-22-1 et seq.	yes / yes	y	n	n
Alaska	15.13.010 et seq.	yes / yes	y	n	n
Arizona	16-901 et seq.	yes / no	y	n	n
Arkansas	3-1102 et seq.	yes / no	y	n	n
California	12400 et seq.	yes / yes	y	n	y
Colorado	1-45-101 et seq.	yes / yes	y	n	n
Connecticut	9-333 et seq.	yes / yes	y	n	n
Delaware	8001 et seq.	yes / no	y	n	n
Florida	106.01 et seq.	yes / yes	y	n	n
Georgia	21-5-1 et seq.	yes / yes	y	n	n
Hawaii	11-1 et seq.	yes / yes	y	n	n
Idaho	67-6601 et seq.	yes / yes	y	n	n
Illinois	9-1 et seq.	yes / yes	y	n	n
Indiana	3-4-1-1 et seq.	yes / yes	y	n	y
Iowa	56.1 et seq.	yes / yes	y	n	n
Kansas	25-4143 et seq.	yes / no	y	y	n
Kentucky	121.015 et seq.	yes / yes	y	n	n
Louisiana	18:1481 et seq.	yes / no	y	n	n
Maine	1411 et seq.	yes / yes	y	n	y
Maryland	33:26.1 et seq.	yes / yes	y	n	n
Mass.	C55.1 et seq.	yes / yes	y	n	n
Michigan	4.1703(1) et seq.	yes / yes	y	n	n
Minnesota	10A.01 et seq.	yes / yes	y	y	n
Mississippi	23-3-1 et seq.	yes / no	y	n	n
Missouri	130.011 et seq.	yes / yes	y	y	y
Montana	13-1-101 et seq.	yes / yes	y	n	y
Nebraska	49-1401 et seq.	yes / yes	y	y	n
Nevada	2941.002 et seq.	yes / no	y	n	n
New Hamp.	664:1 et seq.	yes / yes	y	n	n
New Jersey	19:44A-1 et seq.	yes / yes	y	n	n
New Mexico	1-19-2 et seq.	yes / yes	y	n	n
New York	14-100 et seq.	yes / yes	y	n	n
N. Carolina	163-278.6 et seq.	yes / yes	y	n	n
N. Dakota	16.1-08-01 et seq.	yes / no	y	y	n
Ohio	3516.10 et seq.	yes / yes	y	n	n
Oklahoma	74 4200 et seq.	yes / yes	n	n	n
Oregon	260.005 et seq.	yes / yes	y	n	n

State	Citation	Elections Candidate/Issue	Exemptions <$	Purpose	Press
Pennsylvania	3221 et seq.	yes / yes	y	n	n
Rhode Island	17-25-2 et seq.	yes / yes	y	n	n
S. Carolina	8-13-610 et seq.	yes / yes	y	n	n
S. Dakota	12-25 et seq.	yes / yes	y	n	n
Tennessee	2-10-101 et seq.	yes / yes	y	n	y
Texas	14.01 et seq.	yes / yes	y	n	y
Utah	20-14-1 et seq.	yes / no	y	n	n
Vermont	2101 et seq.	yes / no	y	n	n
Virginia	24.1-251 et seq.	yes / no	y	n	n
Washington	42.17 et seq.	yes / yes	y	y	n
W. Virginia	3-8-1 et seq.	yes / yes	y	n	n
Wisconsin	11.001 et seq.	yes / yes	y	n	n
Wyoming	22-25-101 et seq.	yes / yes	y	n	n

DEFINITIONS

1) **ELECTIONS:** Any primary, general, or special election.
Candidate: Elections which involve voting for a particular individual for state or local office.
Issue: Elections for a referendum or other ballot measure concerning general public policy.

2) **EXEMPTIONS:** Statutory provision, AG opinion, or case excluding a group from coverage under the registration and reporting requirements.
<$: Y in Table indicates an exemption for expenditures and contributions below a specified dollar amount.
Purpose: Y in Table indicates that in determining whether a group constitutes a political action committee, state authorities are allowed to consider in some fashion the primary purpose or nature of the contributing or expending group. The statutes either exempt groups which are less political in nature, or allow a higher expense threshold before the registration and reporting requirements are triggered.
Press: Y in Table indicates that the statute provides an exemption for the institutional press. N in Table does not mean that the press is necessarily included within the scope of the statute, but that no express exemption, case law, or Attorney General opinion could be located which clearly exempts the press from the registration or reporting requirements of the statute.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on September 23, 1987, I served the within *Brief Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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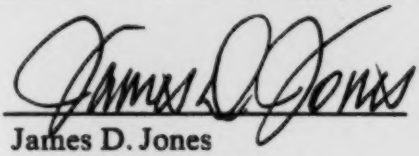
I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 1987, at Los Angeles, California.



James D. Jones
(Original signed)